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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-490

GERALD MATHENY,
PETITIONER

VS.

STATE OF ALABAMA,
RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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BRIEF AND ARGUMENT FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Criminal Appeals affirming the judgment of the Circuit Court of Montgomery County is reported as follows:

Matheny v. State, 313 So. 2d 547, 54 Ala. App. ____ (1975)

The opinion of the Supreme Court of Alabama denying a Petition for Writ of Certiorari is reported as follows:

Matheny v. State, 313 So. 2d 552, ____ Ala. ____ (1975)

POOR COPY

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Title 28 United States Code Section 1257(3).

QUESTIONS PRESENTED

1. Whether this Court's decision in *Miller v. California* renders invalid the definition of obscenity as set out in Title 14 Section 374(3) of the Code of Alabama.
2. Whether the materials involved in this case are obscene and therefore not protected by the constitution.

STATUTORY PROVISIONS INVOLVED

Title 14 Section 374(1) - 374(16) of the Code of Alabama.

STATEMENT OF THE CASE

On July 12, 1973, K. W. Jones, an investigator for the District Attorney's Office, went to Jimmy's News Stand in Montgomery, Alabama, and purchased from Gerald Matheny three publications; *Krazy Kittens Number 5*, *Gay Blades*, and *Depravity Post*.

The Petitioner was charged in the county court with violation of Title 14 Section 374 (4), Cumulative Pocket Part, Code of Alabama, 1940, and in November, 1973, an indictment was returned by the Grand Jury of Montgomery County. After a trial by jury, the Petioner was found guilty on December 3, 1973. Petitioner was sentenced to imprisonment for a period of six months and assessed a fine of $500.00.

The judgment of the trial court was affirmed by the Alabama Court of Criminal Appeals on February 18, 1975.

The Alabama Supreme Court denied a petition for writ of certiorari on May 1, 1975.

ARGUMENT

The Petitioner argues that the Alabama obscenity statute is invalid because of this Court's decision in *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973). According to the Petitioner, the *Miller* decision renders the statute invalid as being vague because the new standards set out in *Miller* had not been engrafted into the Alabama statute by judicial construction at the time of the Petitioner's conviction.

This argument had been expressly rejected in the case of *Hamling v. United States*, 418 U.S. 87, 41 L. Ed. 2d. 590, 94 So. Ct. 2887 (1974). In *Hamling* this Honorable Court once again approved Title 28 U.S.C. 1461, a criminal statute outlawing the mailing of obscene materials. 18 U.S.C. 1461 refers to obscene materials in the following words: "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance. . . ." The State statute, at issue, on the other hand, defines "obscene" this way: "Obscene means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to purient interest." Title 14 Section 374(3), Appendix "C" of the Petitioner's brief, page A.14.

This language is considerably more definite than that approved in *Hamling*.

At page 616 of 41 L. Ed. 2d this Honorable Court stated in *Hamling:* "In *Roth v. United States*, 354 U.S. at 419, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957) we upheld the con-

stitutionality of 18 U.S.C. §1461 [18 U.S.C. §1461] against a contention that it did "not provide reasonably ascertainable standards of guilt and therefore violate[s] the constitutional requirements of due process. . . ." The Court then went on to mention other cases in which the constitutionality of the federal statute had been upheld.

The Court in *Hamling* emphasized on page 617 of the opinion that:

> "At no point does *Miller* or any of the other obscenity decisions decided last term intimate that the constitutionality of pre-Miller convictions under statutes such as 18 U.S.C. §1461 [18 U.S.C.S. §1461] was to be cast in doubt. Indeed, the contrary is readily apparent from the opinions in those cases. We made clear in *Miller*, 413 U.S. at 24 N 6, 37 L. Ed. 2d 419, that our decision was not intended to hold all state statutes inadequate and we clearly recognized that existing statutes 'as construed heretofore or hereafter, may be adequate.' . . ."

The Court in *Hamling also* specifically rejects the case of *Bouie v. City of Columbia*, 378 U.S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964), relied on by the Petitioner. The Court stated at page 620 of L. Ed. 2d:

> "Nor do we find merit in petitioners' contention that cases such as Bouie v. City of Columbia, 378 US 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964), require reversal of their convictions. The Court in Bouie held that since the crime for which the petitioners there stood convicted was 'not enumerated in the statute' at the time of their conduct, their conviction could not be sustained. Id. at 363, 12 L. Ed. 2d 894. The Court noted that 'a deprivation of the right of fair warning can re-

sult not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.' Id., at 352, 1 2L. Ed. 2d 894. *But the enumeration of specific categories of material in Miller which might be found obscene did not purport to make criminal, for the purpose of USC §1461 [18 USCS §1461], conduct which had not previously been thought criminal.* That requirement instead added a 'clarifying gloss' to the prior construction and therefore made the meaning of the federal statute involved here 'more definite' in its application to federal obscenity prosecutions. Bouie v. City of Columbia, supra, at 353, 12 L. Ed. 2d 894. Judged by both the judicial construction of §1461 prior to Miller, and by the construction of that section which we adopt today in the light of Miller, petitioners' claims of vagueness and lack of fair notice as to the proscription of the material which they were distributing must fail." (emphasis supplied)

Thus the argument of the Petitioner has been expressly rejected by this Court as recently as June of 1974. Respondent respectfully submits that the Petitioner has not raised any new reasons for causing this Court to reconsider its decision in *Hamling*.

II

This Honorable Court has before it the materials involved in the prosecution of the Petitioner. Respondent respectfully invites the Court to determine for itself that the materials are obscene and therefore not entitled to protection under the constitution. Obscene materials are utterly without First Amendment protection. *Rosen v. United States*, 161 U.S. 29, 40 L. Ed. 606, 16 S. Ct. 434 (1896); *Roth v.*

United States, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957); *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 92 S. Ct. 2607 (1973); *Hamling v. United States*, 418 U.S. 87, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974).

CONCLUSION

In conclusion, the State of Alabama, Respondent, respectfully submits that the decision of the Alabama Court of Criminal Appeals is correct and that the Petitioner was properly convicted. The Respondent therefore respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David W. Clark, an assistant Attorney General of Alabama and a member of the Bar of the Supreme Court of the United States, one of the attorneys for the Respondent, do hereby certify that on this _____ day of November, 1975, I did serve the requisite number of copies of the foregoing Brief and Argument of the Respondent on the Attorneys for the Petitioner by mailing said copies to them, first class postage prepaid, and addressed as follows:

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